

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BOBBY JEHU STROUP,

Case No. 3:12-cv-00414-MMD-VPC

Petitioner,

ORDER

v.

RENEE BAKER, *et al.*,

Respondents.

Bobby Jehu Stroup, a prisoner at Nevada's Ely State Prison (ESP), in Ely, Nevada, is the pro se petitioner in this habeas corpus action. Stroup is serving four (4) life terms, without the possibility of parole, on convictions for two (2) first degree murders with the use of a deadly weapon.

Stroup submitted his federal habeas petition for filing on August 6, 2012, and it was filed on September 25, 2012, after he paid the filing fee. (See Order entered September 25, 2012 (dkt. no. 4); Petition for Writ of Habeas Corpus (dkt. no. 7).) Respondents filed an answer on January 17, 2013 (dkt. no. 12), and Stroup filed a reply on July 11, 2013 (dkt. no. 40). Stroup's habeas petition is, therefore, fully briefed and under submission to the Court.

On December 2, 2013, Stroup filed a "Motion for Order for Return of Legal Property" (dkt. no. 43) ("Petitioner's Motion"). Respondents filed an opposition to that motion on January 10, 2014 (dkt. no. 47). Stroup did not reply.

1 In his motion, Stroup requests "an order mandating the Nevada Department of
2 Corrections ("NDOC") at Northern Nevada's Correctional Center at Carson City,
3 Nevada, and Sergeant Wagner, to release and return to petitioner (5) five boxes of
4 petitioner's legal materials that [were] taken August 27, 2013, there." (Petitioner's
5 Motion, p. 1.) Stroup states in his moving papers that, over the years, during the
6 litigation of the appeal of his conviction and his post-conviction litigation in state and
7 federal court, he accumulated eight (8) boxes of legal materials. (Declaration of Bobby
8 Jehu Stroup, attached to Petitioner's Motion, pp. 1-2.) Stroup states that, in 2011 and
9 2012, he was transferred temporarily to the Northern Nevada Correctional Center
10 ("NNCC") in Carson City, Nevada, and, during that temporary transfer, was allowed to
11 keep seven (7) boxes of legal materials. (*Id.*) Stroup states that in February 2013, he
12 was again transferred to NNCC, and was allowed to take eight (8) boxes of legal
13 materials with him. (*Id.*) Stroup states that, then, in October 2013, when he was set to
14 be transferred back to ESP, a Sergeant Wagner at NNCC told him that he could have
15 only three (3) boxes of legal materials, and that he had to choose three (3) of the boxes,
16 at random, for transport back to ESP. (*Id.*) Citing *Bounds v. Smith*, 430 U.S. 817
17 (1977), and *Johnson v. Avery*, 393 U.S. 483 (1969), Stroup argues that the prison
18 officials' arbitrary and capricious application of prison policy has violated his
19 constitutional right to meaningful access to the courts. (Petitioner's Motion, p. 2.)

20 In their opposition to the motion, the respondents provide the Court with
21 Administrative Regulation (AR) 722, which sets forth the NDOC's policies regarding
22 possession of legal materials by inmates. (See Exhibit 1 to Opposition to Petitioner's
23 Motion.) AR 722 limits Nevada prisoners to three (3) boxes of legal materials.
24 Respondents also submit with their opposition to Stroup's motion a declaration of
25 Elizabeth Walsh, an associate warden at NNCC. Walsh states that "[t]he limitation on
26 legal boxes is necessary to, among other things, ensure that prison facilities comply
27 with applicable fire codes and regulations." (Declaration of Elizabeth Walsh, Exhibit 2 to
28 Opposition to Petitioner's Motion, p. 1.) Walsh states, further, that "inmates who require

1 more than three legal boxes may appeal the limitation through the inmate grievance
2 process.” (*Id.*)

3 In her declaration, Walsh goes on to provide an update regarding Stroup’s
4 possession of legal materials, stating the following regarding events that took place after
5 Stroup filed his motion.

6 On December 5, 2013, Bobby Jehu Stroup, NDOC #68623
7 (“Stroup”), was transferred to NNCC. Upon his arrival, it was noted that
8 Stroup’s property included approximately nine boxes of legal documents.

9 On January 3, 2014, I met with Stroup and advised him that he was
10 in violation of the limitation on legal boxes. I also informed Stroup that he
11 would be permitted to sort through and condense his legal documents to
12 be in compliance with the limitation. Stroup stated that he did not believe
13 he would be able to condense his legal documents to three boxes. I then
14 told Stroup that if he was unable to comply with the limitation he would
15 need to request permission to retain additional boxes.

16 On January 9, 2014, I requested that a member of my staff inquire
17 as to the status of Stroup’s legal documents. This staff member reported
18 that Stroup had begun the process of sorting through his legal documents
19 and that Stroup stated he would decide whether to file a request to retain
20 more than three boxes after he had finished reviewing his documents.

21 *Id.* at 1-2.

22 Stroup did not file a reply to respondents’ opposition to his motion.

23 Based upon the moving papers, and the materials submitted in opposition to the
24 motion, and, in particular the declarations of Stroup and Welch, the Court will deny
25 Stroup’s motion.

26 Claims concerning prison conditions, including claims concerning prisoners’
27 access to the courts, are more properly raised in a civil rights complaint filed pursuant to
28 28 U.S.C. § 1983. A habeas corpus petition is the means for a prisoner to challenge the
“legality or duration” of his confinement. *Badea v. Cox*, 931 F.2d 573, 574 (9th
Cir.1991), *quoting Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973); Rule 1 of the Rules
Governing Section 2254 Cases; Advisory Committee Notes to Rule 1 of the Rules
Governing Section 2254 Cases. However, a civil rights action is the proper method for a
prisoner to challenge the conditions of his confinement. *McCarthy v. Bronson*, 500 U.S.
136, 141-42 (1991); *Preiser*, 411 U.S. at 499; *Badea*, 931 F.2d at 574.

1 Furthermore, even if the Court were inclined to entertain Stroup's motion, it
2 appears to the Court that Stroup seeks an injunction against a state agency and an
3 individual that are not parties to this action. In his motion, Stroup seeks what would
4 essentially be injunctive relief against the NDOC and Sergeant Wagner; however,
5 neither the NDOC nor Sergeant Wagner is a party to this action. The respondents are
6 the warden of ESP, where Stroup is incarcerated, and the Attorney General of the State
7 of Nevada. There is no showing that either of those parties could properly be subjected
8 to an injunction as is sought by Stroup.

9 Moreover, even putting aside these fundamental flaws of Stroup's motion, Stroup
10 does not make a showing that injunctive relief is warranted. To prevail on a request for
11 injunctive relief, the moving party must show either "(1) a likelihood of success on the
12 merits and the possibility of irreparable injury, or (2) the existence of serious questions
13 going to the merits and the balance of hardships tipping in [the moving party's] favor."
14 *Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc.*, 762 F.2d 1374, 1376 (9th
15 Cir.1985), *quoting Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521,
16 523 (9th Cir.1984); *see also Hartikka v. United States*, 754 F.2d 1516, 1518 (9th
17 Cir.1985). Those two formulations represent two points on a sliding scale. *Oakland*
18 *Tribune*, 762 F.2d at 1376. "Under either formulation of the test, [the moving party] must
19 demonstrate that there exists a significant threat of irreparable injury." (*Id.*) In the
20 absence of a significant showing of irreparability, the Court need not reach the issue of
21 likelihood of success on the merits. (*Id.*)

22 Stroup has not shown any possibility of irreparable injury. A prisoner alleging a
23 violation of his right of access to the courts must demonstrate that he has suffered
24 "actual injury." *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996). The actual-injury
25 requirement mandates that an inmate "demonstrate that a nonfrivolous legal claim had
26 been frustrated or was being impeded." (*Id.* at 353.) Stroup does not demonstrate that
27 he has suffered, or will suffer, any actual injury in this case absent injunctive relief. The
28 record reflects that Stroup has been able to litigate this action — he filed his reply to

1 respondents' answer, and his petition is fully briefed and under submission to the Court.
2 And, it is not even clear that Stroup has, in fact, ever been deprived of any legal
3 materials related to this case. Walsh's declaration indicates that, as of January 9, 2014,
4 more than a month after he filed his motion, Stroup still had eight boxes of legal
5 materials, he was sorting through those boxes to determine whether he could condense
6 his materials down to three boxes, and he would have the opportunity to request
7 permission to retain more than three boxes if necessary. (See Declaration of Elizabeth
8 Walsh, Exhibit 2 to Opposition to Petitioner's Motion.) Again, Stroup did not reply. In
9 sum, Stroup does not demonstrate any possibility of injury, as is required by *Lewis v.*
10 *Casey*. The Court finds that Stroup has not been denied access to the courts. Stroup's
11 motion for injunctive relief must be denied.

12 It is therefore ordered that petitioner's Motion for Order for Return of Legal
13 Property (dkt. no. 43) is denied.

14 DATED THIS 8th day of July 2014.

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18 MIRANDA M. DU
19 UNITED STATES DISTRICT JUDGE
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